IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

In re GEORGE H. HUTCHINSON,	)	BK CASE 01-00173-WRS
	)	Chapter 7
Debtor.	)	
	)	ADV. PRO. NO. 03-03025-WRS
	)	

	)	
FRANK CLARK, *et. al.*,	)	
	)	
Appellants,	)	
	)	
v.	)	**CASE NO. 2:03-CV-730-F**
	)	
TOM MCGREGOR, Trustee,	)	
	)	
Appellee.	)	

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

Frank Clark, Etta Clark, and Clark Brother's (hereinafter "Appellants'") appeal the bankruptcy court's judgment in favor of plaintiff in adversary proceeding 03-03025 in the Chapter 7 bankruptcy of George H. Hutchinson (hereinafter "the Debtor"). For the reasons stated below this Court finds that the Bankruptcy Court erred in entering judgment for the plaintiff. Accordingly, the judgment of the Bankruptcy Court is REVERSED and the case is REMANDED for further proceedings not inconsistent with this Opinion.

II. STANDARD OF REVIEW

District courts function as an appellate court in reviewing the bankruptcy courts' decisions. *In re Sublett*, 895 F.2d 1381, 1383 (11th Cir. 1990) (citing 28 U.S.C. §158(a),

(c)). Accordingly this court will set aside the bankruptcy court's findings of fact only for clear error and will review conclusions of law de novo. *Id.* Because district courts lack the authority to make independent findings of fact when hearing an appeal from the bankruptcy court, this court must remand the case if the bankruptcy court's factual findings are silent or ambiguous at to an outcome determinative factual question. *Id.*

III. RELEVANT FACTS

On January 10, 2001, the Debtor filed a voluntary petition for bankruptcy under Chapter 11 of the United States Bankruptcy Code, and on February 5, 2001 the case was converted to a Chapter 7 bankruptcy. Thereafter, Appellee Tom McGregor (hereinafter "the Trustee"), was appointed trustee of the Debtor's bankruptcy estate.

On February 5, 2003 the Trustee filed an adversary proceeding against the appellants. The Complaint alleges that certain trucking equipment, listed by description and Vin number, is property of the estate pursuant to 11 U.S.C. §541(a). It further alleges that the appellants are in custody of some or all of the listed equipment, and that in addition, the appellants may have also been in custody of other items of equipment that are property of the estate but not yet discovered by the Trustee. Accordingly, the Trustee requests the Bankruptcy Court to order that the appellants: (1) provide the Trustee with a complete accounting and inventory of each item of equipment in their custody and (2) turnover the trucking equipment listed in the Complaint pursuant to 11 U.S.C. §§542, 543.

The appellants filed an Answer and Motion to Dismiss. The Motion to dismiss argues

that appellants are not in control of the listed equipment. Instead the appellants contend that BEC, Inc., which was not listed as a defendant in the Complaint, is in possession and control of the equipment. The Motion further avers that Etta Clark is an employee of BEC, Inc. It is unclear whether Frank Clark had a relationship with BEC, Inc. The appellants also allege that Clark Brothers is a defunct corporation. Finally the Answer and Motion allege that BEC, Inc. has a "possessory interest" in the vehicles and "possessory lien" for storage and related charges and fees incident to the vehicles possession.

On May 13, 2003, the Bankruptcy Court held a telephonic hearing on the appellants' motion to dismiss. Counsel for the defendants-appellants represented that one or both of the Clarks have a majority share in BEC, Inc. Counsel for both plaintiff and defendants agreed that the Complaint should be amended to add BEC, Inc. as a defendant and Counsel for the plaintiff assured the Court that it would do so promptly. After this was settled, the Bankruptcy Judge asked the parties to argue the merits of the underlying turnover proceeding. Counsel for defendants argued on behalf of BEC, Inc. concerning its "possessory interest" and "possessory lien" in the vehicles for storage. Counsel admitted that BEC, Inc. was not claiming to have title ownership. Further, counsel argued that they had not seen titles to the equipment in question and therefore they were not assured that the debtor in fact had an interest in the vehicles. Counsel for plaintiff promised to show counsel for defendants the titles. After hearing argument, referring to Counsel for the appellants the Bankruptcy Judge stated "[in] my view if you don't own the vehicles, if your client doesn't

claim to own the vehicles, we can turn them over and sell them and, if there is a dispute as to your client's lien on them, we can just pay the money into the court and you and Mr. Gilliland can litigate at your leisure." The Bankruptcy Judge also expressed concern that if the vehicles were not sold in a timely manner they would depreciate in value. When counsel for the defendants-appellants rejected this plan, the Bankruptcy Judge expressed his view that the defendants-appellants were improperly attempting to hold the equipment "hostage" in order to get leverage in their claim for storage fees. After argument became contentions and counsel for the defendants-appellants began speaking over the Bankruptcy Judge[1] the Court ended the hearing, and re-scheduled it for May 19 in the Courtroom. The date was later changed to May 20. The Court instructed the parties to try to resolve the dispute before the hearing.

On May 20, 2003, the Bankruptcy Court held the re-scheduled hearing on the Defendants' Motion to Dismiss. Counsel for both plaintiff and defendants represented that they had agreed with the Court's recommendation that the equipment be sold, and that they were close to reaching an agreement about the sale. They were in the process of working out details regarding whether to sell the vehicles on site or transport the vehicles elsewhere for sale. The defendant-appellants expressed concern that sale on the premises would not yield the best price. The plaintiff-appellee expressed concern that a large amount of the value of

[1] Counsel explained that she could not hear the Bankruptcy Judge and apologized for speaking out of turn.

the property would necessarily be spent on transportation. The Bankruptcy Judge stated "I understand what [the defendants] are trying to do is they are trying to make it so expensive for [the trustee] to [hold the sale] that [the trustee] will abandon it." The Court went on to state that it would enter a judgment ordering a turnover and then counsel could determine the location of the sale on their own.

On May 21, 2003, the Bankruptcy Judge signed a Judgment in favor of the Plaintiff for the reasons set forth at the May 20, 2003 hearing, and ordered the Defendants to turnover the subject equipment. However, this Judgment was not docketed until June 2, 2003. In the interim, on May 27, 2003, the plaintiff made a Motion to Amend Complaint, and a First Amended Complaint that added BEC, Inc. as a defendant was docketed. There is no indication in the record that the Bankruptcy Judge ever granted or denied the Motion to Amend Complaint. The defendant-appellants filed a notice of appeal on June 11, 2003.

IV. DISCUSSION

The defendant-appellants raise two issues on appeal: (1) whether the Bankruptcy Court erred by failing to give the defendants adequate procedure before entering judgment for the appellant and (2) whether the Bankruptcy Court erred by entering a judgment for the plaintiff that does not comply with Bankruptcy Rule 7052. The Court will address each issue in turn.

A. Procedural Deficiencies

The Appellants argue that the procedure afforded by the Bankruptcy Court prior to

Judgement violates the Due Process Clause of the Fifth Amendment to the United States Constitution. Because the Court finds that the procedure was inadequate under Federal Rule of Civil Procedure 56, the Court need not reach the constitutional question. *See Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them").

Although the Bankruptcy Court's judgment did not explicitly grant summary judgment in favor of the plaintiff, considering the procedural posture of the case, summary judgment is the proper label for the relief granted. Given that there was no pending motion for summary judgment, the Bankruptcy Court's action was clearly *sua sponte*.

Pursuant to 11 U.S.C. § 105, the Bankruptcy Court has broad discretion to issue an order or judgment that is necessary or appropriate to carry out the provisions of the Bankruptcy Code, and § 105 explicitly grants Bankruptcy Courts the power to *sua sponte* take any action or make any determination to prevent abuse of process. The Bankruptcy Judge's comments concerning the hostage value of the equipment and the defendant-appellants' attempts to force abandonment suggest that the Bankruptcy Judge was exercising his power under § 105 in order to prevent an abuse of process and to carry out 11 U.S.C. § 542, dealing with turnover of property of the estate. This Court finds no error in the *sua sponte* nature of the Bankruptcy Court's actions. *See* 11 U.S.C. §§105, 542; *see also Massey v. Congress Life Ins. Co.*, 116 F.3d 1414, 1417 (11th Cir. 1997) ("District courts

unquestionably possess the power to trigger summary judgment on their own initiative.")

This Court does find error, however, in the Bankruptcy Court's failure to give the appellants adequate notice and an opportunity to present evidence in opposition to summary judgment. Federal Rule of Civil Procedure 56, made applicable to adversary proceedings before the Bankruptcy Court through Bankruptcy Rule 7056, provides that motions for summary judgment "shall be served at least 10 days before the time fixed for the hearing" and it expressly gives the adverse party the right to serve opposing affidavits prior to the hearing. *See* Fed. R. Civ. P. 56(c). The Eleventh Circuit Court of Appeals has consistently held that these provisions are not a mere technicalities, but rather an important procedural safeguards. *See Burton v. City of Belle Glade*, 178 F.3d 1175, 1203-1204 (11th Cir. 1999); *Massey*, 116 F.3d at 1417. These procedural safeguards are equally applicable when the Court contemplates awarding summary judgment *sua sponte*. *See id.*

Tracking the procedural history of the present case, it is clear that the appellants were not afforded the requisite procedural safeguards under Rule 56. The parties were given no notice that the merits of the underlying action would be taken up at the May 13 hearing. At the conclusion of the May 13 hearing, the Bankruptcy Judge did inform the parties that he may order turnover at the next hearing, but the parties were never offered the opportunity to submit briefs or evidence on the merits of the case. Further, the rescheduled hearing was less than 10 days after the Bankruptcy Judge informed the parties that he was contemplating ordering turnover. At the May 20 hearing, the Court decided to order turnover and signed

the judgment ordering turnover the next day. Although the judgment was not docketed until June 2, the parties were not given any further opportunity to argue the merits of the case after the May 20 hearing. Given these circumstances, it is clear that the appellants were afforded neither the ten day notice requirement nor an adequate opportunity to present evidence as required by Federal Rule of Civil Procedure 56.[2]

B. Bankruptcy Rule 7052

Appellants argue that the Judgment entered by the Bankruptcy Court is insufficient under Bankruptcy Rule 7052 because it does not make findings of fact or conclusions of law. The Court disagrees with the appellants and finds no error on this ground.

Bankruptcy Rule 7052 makes Rule 52 of the Federal Rules of Civil Procedure applicable in adversary proceedings before the Bankruptcy Court. Rule 52(a) reads in pertinent part,

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to rule 58...it will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of evidence or appear in an opinion or memorandum of decision filed by the court. Findings

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[2] The Court notes that the Eleventh Circuit recently found harmless error where less than ten days notice was given before a *sua sponte* summary judgment. *See Artistic Entertainment, Inc. v. City of Warner Robins*, 331 F.3d 1196, 1201-02 (11th Cir. 2003). In *Artistic Entertainment*, however, the record was fully developed and the only a purely legal question remained. By contrast, in the present case the record is hardly developed at all, and factual questions are at issue. Accordingly *Artistic Entertainment* is not controlling in the present case.

> of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 and 56....

Fed. R. Civ. P. 52(a).

It is clear from the text of Rule 52 that when summary judgment is granted pursuant to Rule 56, findings of fact and conclusions of law are unnecessary. As the Court explained above, given the procedural posture of the case, summary judgment is the proper label for the relief granted. Therefore Federal Rule of Civil Procedure 52 is inapplicable and there is no error on this ground.

V. CONCLUSION

For the foregoing reasons, the Judgement of the Bankruptcy Court dated May 21, 2003 is REVERSED and this case is REMANDED for proceedings not inconsistent with this Opinion.

DONE this the 21st day of September, 2004.

/s/ Mark E. Fuller
CHIEF UNITED STATES DISTRICT JUDGE